Supreme Court, U.S.
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No. 93-262

In The

Supreme Court of the United States

October Term, 1993

PATRICIA L. BUELL,

Petitioner,

vs.

SECURITY GENERAL LIFE INSURANCE COMPANY,
An Oklahoma Corporation, et al.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION

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RESPONDENT'S STATEMENT OF THE CASE

Several aspects of petitioner's Statement of the Case require a response.

1. Petitioner's Statement of the Case is incomplete because it neglects to recite that following the termination of the policy, Security General Life Insurance Company ("Security General") continued to provide petitioner with benefits under the policy. The district court specifically found that petitioner received continuous policy benefits and that the insurance contract was never breached. (Pet. App. at A-7.) Despite the policy's termination, petitioner experienced no interruption in coverage.

2. Petitioner claims that respondent belatedly supplied discovery which her expert needed to form an opinion. (Pet. at 4.) No factual support is provided for this allegation and the courts below made no such finding. Security General denies that any discovery was belatedly supplied.

3. Petitioner presents legal argument in her Statement of the Case. (Pet. at 4-5.) Respondent addresses these matters in its argument below.

SUMMARY OF ARGUMENT

A. The inter-circuit conflicts claimed by petitioner do not exist.

B. Petitioner waived any application of an excusable neglect standard under Fed. R. Civ. P. 6(b) by specifically asking the district court to treat its motion to

reconsider under Fed. R. Civ. P. 59(e) and by not raising any issue regarding Rule 6(b) before the Tenth Circuit Court of Appeals ("Tenth Circuit"). In any event, Rule 59(e) provides the applicable standard because it deals with the specific procedural situation presented below. Finally, the evidence offered in the motion to reconsider was irrelevant.

C. There are no special or important reasons for this Court to review the Tenth Circuit's reading of an unambiguous state statute.

D. Although petitioner claims that the Tenth Circuit held that reinstatement of benefits moots a claim for bad faith breach, the court below made no such ruling. Certiorari should not issue to review a decision which was never made.

ARGUMENT

A. NO INTER-CIRCUIT CONFLICTS EXIST.

Petitioner asserts that each of her proposed issues for certiorari involve "inter-circuit conflicts." (Pet. at 8, 10, 12.) No conflicts exist. With only a single exception,[1]

[1] In her Statement of the Case, petitioner cites *Berry v. United of Omaha*, 719 F.2d 1127 (11th Cir. 1983). *Berry* held that an action for bad faith breach accrues when the insurer first refuses to pay a claim and that the insurer's eventual decision to make payment provides no defense. 719 F.2d at 1129. *Berry* creates no conflict. The Tenth Circuit below neither held nor implied that

petitioner does not even attempt to cite cases embodying the supposed differences among the circuits. Phantom conflicts do not justify certiorari review.

B. CERTIORARI SHOULD NOT ISSUE REGARDING PETITIONER'S MOTION UNDER FED. R. CIV. P. 59(e).

Following the district court's entry of summary judgment against petitioner on her breach of contract and tort claims, petitioner filed a motion to reconsider which sought to introduce what she claimed was "new" evidence. (Pet. App. at A-11-17.) Petitioner later specifically asked the district court to accept her motion to reconsider as a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e). (Pet. App. at A-22.) The district court granted plaintiff's request to treat the motion to reconsider under Rule 59(e), but declined to change its ruling. (Pet. App. at A-22-28.) The Tenth Circuit affirmed. (Pet. App. at A-39.)

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its decision was in any part based on Security General's continued payments to petitioner. (*See infra* at 6.) This had been a basis of the district court's decision (Pet. App. at A-7), but the Tenth Circuit affirmed summary judgment not because of the continued payments, but rather because the contract authorized the termination of coverage. (Pet. App. at A-35-36.) Moreover, even the district court's decision was consistent with *Berry*. Although in *Berry* the insurer initially refused to pay claims, in this case the district court found that benefits were paid without any interruption at all, and that the contract was never breached. (Pet. App. at A-4, A-7, A-9.) Under these circumstances, no cause of action arises even under the *Berry* decision. No conflict exists.

Petitioner now claims – for the first time ever – that the courts below erred by failing to apply an "excusable neglect" standard under Fed. R. Civ. P. 6(b). (Pet. at 8) (citing *Pioneer Inv. Services v. Brunswick Associates*, ___ U.S. ___, 113 S.Ct. 1489 (1993)). No basis is shown for granting certiorari. Petitioner waived any application of the Rule 6(b) standard by specifically asking the district court to treat her motion to reconsider under Rule 59(e) and by not raising any Rule 6(b) issues before the Tenth Circuit. Moreover, Rule 6(b) is inapplicable. Rule 6(b) governs situations where "by order of court an act is required or allowed to be done within a specified time." The issue here instead involves whether petitioner should have been allowed to supplement her post-judgment motion with additional evidence that was not part of the record – a situation governed by Rule 59(e).

In any event, the specific evidence offered in the motion to reconsider was irrelevant. (Pet. App. at A-39.) The determination of relevance hinged on the Tenth Circuit's correct application of contract language providing that Security General had the right to terminate the policy for any reason other than the deterioration of an individual insured's health. (Pet. App. at A-36-37, 39.) The Tenth Circuit's determination that petitioner's evidence was irrelevant involves no special or important issue which would support a granting of certiorari. *See United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts.").

C. CERTIORARI SHOULD NOT ISSUE TO REVIEW THE TENTH CIRCUIT'S READING OF THE CLEAR LANGUAGE OF A STATE STATUTE.

Petitioner asks this court to review the Tenth Circuit's holding that Colo. Rev. Stat. §§ 10-8-116(2)(b)(V) and -116(3) by their terms apply only to policies delivered or issued for delivery in Colorado. (These provisions are set out verbatim in Appendix A.) There are no special or important reasons for this Court to review issues concerning the proper reading of this state statute.

Petitioner also claims that the applicability of these statutes depends upon general choice of law principles, such as whether Colorado had a "significant relationship" with the transaction. (Pet. at 11.) Under the choice of law method prevailing in Colorado, however, the legislative directive that the statute apply only to policies delivered or issued for delivery in Colorado takes precedence over general choice of law rules and must be followed. *See Restatement (Second) of Conflicts of Laws* § 6(1) *(quoted in Wood Bros. Homes, Inc. v. Walker Adj. Bureau,* 198 Colo. 444, 601 P.2d 1369, 1372 n.3 (1979)). The evidence was undisputed that the policy was not delivered in Colorado. (Pet. App. at A-34.) Although a certificate of insurance was delivered to petitioner in Colorado, the delivery of a certificate is not tantamount to the delivery of a policy. *New England Mut. Life Ins. Co. v. Gray,* 786 F.2d 406, 408-09 (6th Cir. 1986). No choice of law issue exists.

D. CERTIORARI SHOULD NOT ISSUE TO REVIEW A MATTER NOT DETERMINED BY THE COURT BELOW.

Petitioner finally asserts that the Tenth Circuit erred in holding "that reinstatement of benefits following institution of a bad faith tort action renders the action moot." (Pet. at 12.) But no such holding or remotely similar ruling appears anywhere in the Tenth Circuit's decision. Summary judgment was affirmed not because petitioner continued to receive benefits (although she did), but rather because Security General by contract had the right to terminate the policy for any reason other than the deterioration of an individual insured's health. (Pet. App. at A-35-36.) Certiorari should not issue for the wholly academic purpose of reviewing a matter which was never considered by the court below. *See Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 74 (1955) (certiorari review not exercised to resolve academic issues or to benefit particular litigants).

CONCLUSION

For these reasons, the Petition for Certiorari should be denied.

Dated: September 16, 1993

Respectfully submitted,

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APPENDIX A

C.R.S. § 10-8-116(2)(b)(V), now codified at C.R.S. § 10-16-108(1)(a) (Cum. Supp. 1992), provides:

> If the group insurance policy provides hospital, surgical, or major medical insurance or any combination of these coverages on an expense-incurred basis, for other than specified diseases or accidental injuries only, it shall also contain a conversion privilege conforming to the requirements of subsection (3) of this section.

C.R.S. § 10-8-116(3)(a), now codified at C.R.S. § 10-16-108(1)(c)(I) (Cum. Supp. 1992), provides:

> A group policy delivered or issued for delivery in this state which provides hospital, surgical, or major medical expense insurance or any combination of these coverages on an expense-incurred basis, but not including a policy which provides benefits for specific diseases or for accidental injuries only, shall provide that an employee or member whose insurance under the group policy has been terminated for any reason other than discontinuance of the group policy in its entirety or with respect to an insured class or failure of the employee or member to pay any required contribution and who has been continuously insured under the group policy (and under any group policy providing similar benefits which it replaces) for at least three months immediately prior to termination is entitled to have issued to him by the insurer a policy of sickness and accident insurance, referred to in this subsection (3) as the "converted policy". . . .